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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 584

WILLIAM BERNARD WERNECKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition of William Bernard Wernecke for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 7th day of February, 1944, Denying Said Petitioner Said Writ of Certiorari.

LEO L. DONAHOE and
LAURENCE B. JACOBS,
Chicago, Illinois,
Attorneys for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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The authorities cited by respondent do not support the lower court's judgment and opinion sustaining the Government's contention that petitioner "did evade or attempt to evade" service in the armed forces by "falsely assuming and pretending to become a minister of religion" (Count III of the indictment), nor dispose of petitioner's fundamental contention that the District Attorney's attack upon petitioner's ordination as a minister of religion; the ridicule and derision of his religious belief and doctrines by testimony of Government witnesses; inflammatory and improper argument to the jury; and conduct of the trial judge admitting improper evidence over objection, violated petitioner's rights and liberties guaranteed to him in Article II of the Bill of Rights of the Constitution of Illinois (1870) 7

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition of William Bernard Wernecke for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 7th day of February, 1944, Denying Said Petitioner Said Writ of Certiorari.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Bernard Wernecke, petitioner in the above entitled application for a writ of certiorari

to the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, respectfully represents that he is aggrieved by the judgment of this honorable Court, rendered herein on the 7th day of February, 1944, denying to him said writ of certiorari.

Petitioner says that he duly filed his petition for said writ, and brief in support thereof, in this court on the 7th day of January, 1944; and that the Solicitor General duly accepted service of said petition, brief, and transcript of record upon respondent on, to wit, January 8, 1944; that the brief of respondent in opposition to the granting of said writ was filed on or about January 18, 1944, and copies thereof furnished to counsel on January 19, 1944; that the exact dates of such acceptance of service and filing of opposition brief by respondent's counsel are unknown to petitioner, but will be shown by the record thereof in the office of the clerk of this court; but no question is made or intended to be raised by petitioner as to whether respondent's brief was filed within the time prescribed therefor, and if not so filed petitioner waives any right it may have had or now has to object upon this ground to the filing or consideration thereof. But petitioner says that all events, between the time said brief reached the hands of petitioner's counsel and the time of the convening of this court and the presentation of said petition and briefs of counsel thereon for his consideration, it was impossible for petitioner's counsel to prepare and file a reply to respondent's brief, and that in fairness to petitioner he should be given opportunity to present his reply to said brief, for the consideration of this court before its judgment denying said writ of *certiorari* shall become foreclosed; this for the following reasons, among others:

That petitioner's contentions upon said application were:

1. An indictment must show upon its face that a crime has been committed by the defendant; the offense must be shown by facts put of record so the defendant may prepare for trial and have protection against double jeopardy and the court may see subject matter to be adjudicated, otherwise the indictment will not support the verdict thereon.

2. The Defendant was prejudiced before the jury by the statements of the trial judge.

3. The attorneys for the Government were permitted over objection to make a violent and inflammatory argument to the jury outside of the issues of the case.

4. The free exercise and enjoyment of religious profession and worship without discrimination, shall forever be guaranteed and no person shall be denied any civil (or political) right, privilege or capacity, on account of his religious opinion, is a Constitutional endowment given to Defendant-Petitioner by the Constitution of Illinois, and such was invaded and his liberty jeopardized by the conduct of the district attorneys and the trial judge.

5. The general search of Defendant's home and seizure of Defendant's papers in his desk in his bedroom at the time of his arrest on the back porch of the dwelling house were unreasonable acts and violated his Constitutional right to be free from unreasonable searches and seizures.

6. The instruction given by the Court to the Jury as to disregarding the entire testimony of a witness who may have testified to any matter material to the issues, except as corroborated, was error.

7. The exemption extended by Congress to a duly ordained minister of religion is made to the man who is such and the regulations limiting that exemption are void for want of power and as invading the judicial field.

8. The Court erred in admitting testimony of the witnesses Healy and Strope for purposes of proving intent, their testimony being of statements said to have been made prior to the Selective Service Act.

That in the brief for the Government, its counsel take the position that the decision below is clearly correct, because:

1. There is no merit in petitioner's contention that both points on which he was convicted are fatally defective for vagueness and failure to inform him of the offenses charged. To this point were cited numerous decisions in this Court, including some of those cited by the lower court in its opinion.

2. That even though petitioner argues that since the Allied Christian Management Army was a duly organized religious corporation, the Government could not challenge its certification of petitioner as a minister; that since the undisputed evidence in respect of petitioner's attendence and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire and since the sentences under the 2 counts are concurrent, it is unnecessary to consider this contention.

3. That the admission of the exhibits claimed by petitioner to have been taken from his home as a result of an illegal search was not prejudicial and does not constitute a reversible error; citing many decisions of this Court.

4. That the evidence of Government witnesses, Irma Strope and Raymond Healy was clearly admissible as showing that petitioner's purpose in assuming to become a minister was to evade service as charged in that count. To this point, also were cited many decisions in this Court, and that of the U. S. Circuit Court of Appeals.

5. That the prosecutor's statements to the Jury complained of by the petitioner as violent, inflammatory arguments outside of the issue of the case, constituted legitimate rebuttal and were based directly upon evidence; citing decisions of this Court.

6. That the remarks of the trial judge asserted by the petitioner to be prejudicial did not constitute grounds for reversal even if it be considered an expression of his opinion as to petitioner's guilt; citing numerous decisions of this Court.

7. That the instruction to the Jury by the Court as to disregarding the entire testimony of the witnesses who may have testified to any matter material to the issues except as corroborated, complained by petitioner as error, was cured by the Court's finding the issues and admonishing the Jury to confine their deliberations to the questions submitted to them.

Petitioner respectfully presents herewith a note of argument in the nature of a reply to said opposition brief for respondent, and asks that it be read and considered in support of this petition; and for the reasons assigned in his original petition and supporting brief for the granting of said writ of certiorari, as well as those assigned herein, petitioner prays that his appli-

cation therefor may be reconsidered and reheard, and upon such rehearing granted, and the judgment and opinion complained of reviewed and reversed by this Honorable Court.

Respectfully,

WILLIAM BERNARD WERNECKE,
Petitioner.

By Counsel.

LEO L. DONAHOE,
LAURENCE B. JACOBS,
Counsel for Petitioner.

United States of America,
State of Illinois,
County of Cook, to-wit:

I, Laurence B. Jacobs, counsel for petitioner in the above entitled action and proceeding, do certify that the foregoing petition for a rehearing of the application for a writ of certiorari made therein is presented in good faith and not for delay.

Given under my hand this 1st day of March, 1944.

LAURENCE B. JACOBS.

NOTE OF ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

The authorities cited by respondent do not support the lower court's judgment and opinion sustaining the Government's contention that petitioner "did evade or attempt to evade" service in the armed forces by "falsely assuming and pretending to become a minister of religion" (Count III of the indictment), nor dispose of petitioner's fundamental contention that the District Attorney's attack upon petitioner's ordination as a minister of religion; the ridicule and derision of his religious belief and doctrines by testimony of Government witnesses; inflammatory and improper argument to the jury; and conduct of the trial judge admitting improper evidence over objection, violated petitioner's rights and liberties guaranteed to him in Article II of the Bill of Rights of the Constitution of Illinois (1870).

In submitting this note of argument for consideration by the Court, petitioner will disregard all other errors complained of (for the purpose of this argument) and will rely solely and entirely upon the questions presented and answered by respondent under Point II.

Respondent's argument and authorities presented regarding petitioner's answers to questions relating to his attendance and study at the Moody Bible Institute (Respondent's Brief, p. 12) are not borne out by the Record herein filed. Here respondent has stated that "since the undisputed evidence in respect of petitioner's attendance and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire, and since the sentences under the two counts are concurrent, it is unnecessary to consider this contention".

The actual facts are as follows (Rec. 14-16): Mark Neville, Secretary and member of petitioner's Selective Service Board, stated that petitioner was classified as 4-D, an ordained minister or divinity student of a recognized divinity school (Rec. 14). Mr. Wernecke stated that he was a Minister and gave the date on which he became a Minister. It is obligatory for registrants to sign every portion of the questionnaire in so far as it in any wise pertains to them or their activities. Under the law, we could have placed the defendant Wernecke in Class 4-D either for being a Minister or being a theological student. The claim of the defendant Wernecke of being a Minister would have placed him in Class 4-D. The Board took into consideration the answers both as to being a theological student and *an ordained minister* (our italics) in making our classification.

The true intent of the Selective Service Board is here shown by the positive statement of the Secretary and Member of the Board that "the claim of the defendant Wernecke of being a Minister would have placed him in Class 4-D". The record is bare of any evidence that petitioner was placed in Class 4-D as being exempt under the claim that he was a theological student.

The citation offered by the Government (320 U. S. 81) referring to a person convicted on two counts to run concurrently, it is unnecessary on review to consider the validity of the sentence on one of the counts if that, or the other is sustainable, would not apply on this case. If the ordination of the defendant was legal, then the other count in his indictment would necessarily fall because he did not claim exemption on the ground of being a divinity student, and only sets forth some of the activities in which he was engaged to qualify

him to better administer his duties as a duly ordained minister of religion.

The fact that this matter has not been directly passed upon by the Court makes it imperative that the law should be settled regarding the manner of voiding the selectee's classification.

Respondent contends (Resp.'s Brief 12) that it is clear that just as a draft board is not bound by a religious sect's fiat that certain of its members are ministers, the Government may show that a purported ordination of a person as a minister was not authentic but was merely a fraudulent device to evade service. The whole case, therefore, revolves about the question "Whether or not Courts may review a classification or denial of an exemption already settled and determined by the Selective Service Board", and furthermore, "Whether or not, upon a criminal proceeding actually raising these issues, the Government may attempt to show, by testimony regarding defendant's alleged acts and statements months before Pearl Harbor or before the enactment into law of the Selective Service and Training Act of 1940, it was his intention to evade the operation of a Federal law, not then even in existence, by organizing a church and falsely pretend to become a Minister of religion, that he might evade service in a non-existent and undeclared war."

As well might it be said that a man's statements or speculations bearing upon his consideration of what laws *might be* or *could be enacted* in the future may be a lawful test to establish an unbroken continuity of *criminal intent* to evade the just and lawful provisions of a Federal enactment dealing with a similar subject matter, when, as, and if, the same were later made into law.

The record shows (Rec. 101) that William B. Wernecke was duly ordained as a minister of religion by the Allied Christian Management Army (Rec. 98), a duly qualified religious sect under the laws of the State of Illinois. The question to be determined by the Court is whether that ordination can be attacked collaterally.

In the Selective Service and Training Act, it is stated that no recourse to the Courts for relief may be granted. Therefore, if the ordination of a minister could be attacked collaterally, then no minister of religion could be assured that his status was defined.

All persons under the Selective Service Act stand in the same light and are measured by the same standards and no one should be treated any differently because of his affiliations or actions.

The Government in their trial, raised many inferences that petitioner William B. Wernecke was associating with persons and with the Bund, who it is claimed were acting in an unpatriotic and seditious manner. Unless his ordination can be attacked collaterally, these inferences raised by the Government were erroneous and prejudicial. We contend that the Government has no right to question this ordination in the Courts. If the Selective Service and Training Board had called Wernecke in for re-classification and had put him in Class 1-A, and he had then stood in defiance of the Board, he would have then brought himself within the purview of some of the cases cited by the Government. All of the cases cited as follows:

Cf. *Debs.* v. *United States,* 249 U. S. 211, 215; *Williamson* v. *United States,* 207 U. S. 425, 451; *Allis* v. *United States,* 155 U. S. 117, 119; *Wood* v. *United States,* 16 Pet.

342, 360-361; *Viereck* v. *United States,* 130 F. (2d) 945, 959-960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley,* 132 Fed. (2d) 170, 180-181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States,* 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Herman* v. *United States,* 257 Fed. 601, 603-604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States,* 256 Fed. 805-811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States,* 255 Fed. 301, 304-305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678, were either where the selectee had been called for service and had stood in defiance of the order of the Board or where they were engaged in espionage or subversive activities. This is clearly not the position of the defendant in this case, as he did not stand in defiance of any order, nor was he engaged in any activity that was considered subversive. Petitioner claims that the Government has no right to question his ordination in the Courts as long as it was done in accordance with Section C of the Selective Training Service Act of September 16, 1940, which provides: "A duly ordained minister of religion is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization to preach or teach its doctrines, and to administer its rights and ceremonies in public worship; and who customarily performs those duties."

Under the provisions of the Selective Service Board's authority, they should have recalled the defendant and reclassified him *if there had been any doubt in their mind about the legality of his ordination.* (Our italics.) Not having done so, it is contended that the ordination cannot now be legally voided by the action of the Court.

This doctrine is well settled in the cases of *Checinski* v. *United States* (129 Fed. (2d) 461, 462)* and *Seele* v. *United States* (133 Fed. (2d) 1015, 1023)**.

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* In *Checinski* v. *United States,* the Circuit Court of Appeals said:

> "The only substantial difference between the procedure here followed by the court from that in the *Rase* case, is that the court narrowed the issues holding that under the terms of the law he could not review the evidence presented to the draft boards but could consider only the draft board records, and that in the absence of proof that there was any failure by the boards to consider the evidence presented, or any failure to give the registrants a full and fair hearing, he was without power to review the classification made. There being no such evidence he made a finding of guilt in each of the cases and imposed sentence upon each of the appellants.
>
> (1) The conclusion reached in the *Rase* case that no review of the findings of local draft boards is by the law committed to the courts and that relief may be granted the registrants only when the local board has acted arbitrarily and capriciously and without evidence, is reaffirmed here."

**To the same effect the Circuit Court of Appeals stated in its opinion in *Seele* v. *United States*:

> "It is true that appellant has exhausted such administrative remedies, but it is the generally accepted rule that, under the Selective Training and Service Act, no review of findings of Local Draft Boards upon any classification or the denial of an exemption is committed to the courts, and relief may be granted the registrant only when the Local Draft Board has acted arbitrarily and capriciously and without substantial evidence. *Johnson* v. *United States,* 8 Cir., 126 F. 2d 242; *Rase* v. *United States,* 6 Cir., 129 F. 2d 204; *United States* v. *Grieme,* 3 Cir., 123 F. 2d 811, and many others.

"This is in accord with the pronouncement of the Supreme Court that where the decision of a Director is final and conclusive on any specific matter under an Act, it is not subject to judicial review, 'at least unless the decision be wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious'. *Silberschein* v. *United States,* 266 U. S. 221, 45 S. Ct. 69, 69 L. Ed. 256."

All of which is respectfully submitted.

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Petitioner.